93-237

No. ____

Supreme Court, U.S.
FILED
AUG 2 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DANIEL P. MALONEY,

PETITIONER,

VS.

UNITED STATES OF AMERICA, et al.,

RESPONDENT.

ON ORDER THAT THE PETITION FOR REVIEW

IS DENIED BY THE

SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

DANIEL P. MALONEY, PRO SE

RT. 1, Box 313G

Roberts, Wisconsin 54023

715-246-5519

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Amendments Act and modified controlling laws are in conflict with "whole law of the state"?

2. Whether concurrent jurisdiction applies where occurrences were before August 20, 1988?

3. Whether inconsistent application of time frames in Amendments Act causes retroactive application of 2210 to both ENOs and 2210(N)(2)?

4. Whether sovereign immunity is unavailable to defendants?

5. Whether res judicata is unavailable to defendants?

6. Whether serving of action by U.S. Mail is proper?

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*defendants.

Pentagon, the
Nuclear Regulatory Commission
Dept. of Energy; atomic energy comm.
Central Intelligence Agency

JURISDICTIONAL STATEMENT.

This is an Appeal from the denial of a Petition for Review by the Wisconsin Supreme Court. The Appeal is based on the grounds of a controlling law being modified, conflicting State and Federal law and Constitutional issues and is an Appeal under §237 (a) of the Judicial Code, 28 USC §344 (a), 28 USCA §344 (a). The Petition for Review was denied May 4, 1993; and a Remittitur was dated May 6, 1993 by the Court of Appeals of Wisconsin.

STATUTES AND LAWS.

42 USCS §2210 (d)....Neither political question nor separation of powers doctrine precluded judicial relief against government for damages to property caused by radiation emissions from nuclear weapons manufacturing plant. McKay V. U.S., 703 F. 2d 464 (C.A. Colo. 1983).

42 USCS §2210 (s)....Provision of the Price Anderson Act precluding award of punitive damages with respect to a nuclear incident against a person which the United States is obligated to indemnify applies even if the United States is not obligated to make payments for punitive damages, all that is necessary for the applicability of the statute is that the United States be obligated to make payments under an agreement of indemnification covering a nuclear accident. Cook V. Rockwell Intern. Corp., 755 F. Supp. 1468, (D. Colo. 1991).

42 USCS §2210 (n)(1)....This section conferring original jurisdiction on United States District Courts, without regard for diversity of citizenship or amount of controversy, over any public liability action arising out of extraordinary nuclear occurrence did not apply where Secretary of Energy had not designated incident involved as extraordinary nuclear occurrence. UNC Re-

sources, Inc. V. Benally, 518 F. Supp. 1046, (D.C. Ariz. 1981).

42 USC §2210...."Law of the State" within meaning of Price Anderson Act meant whole law of state, including any choice of law provisions, rather than simply net portion which relates specifically to substance. In re HANFORD NUCLEAR RESERVATION LITIGATION, 780 F. Supp. 1551, (E.D. Wash. 1991).

28 USC §1442 (a)(1)....The Court strongly indicated that a grant of federal jurisdiction over all claims involving federal officers would be invalid. Mesa V. California, 489 U.S. 121, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989).

STATEMENT OF THE CASE.

This case is based on concurrent juriddiction of 42 USCS §2210, the Federal Officer Removal Statute, and modification of controlling law (Silkwood case) in conjunction with intervening decisions creating an altered situation. Defendants are subject to retroactive application of 2210 (s), have "derelict of duty" on ENOs, 2210 (n)(1), have not collaborated with any person 2210 (h), have not offered to settle 2210 (h), with allegations that they have caused all damages, including the Nuclear Waste dumping near Plaintiff's property.

The intervening decisions, IN RE TMI LITIGATION CASES CONSOL. II, 940 F. 2d 832, (3rd Cir. 1991); decision made on July 26, 1991. IN RE HANFORD NUCLEAR RESERVATION LITIGATION, 780 F. Supp. 1551, (E.D. Wash. 1991); decision made Oct. 31, 1991. Plaintiff's Order of Dismissal of first case was June 7, 1991. (appendix, pg.9). The principle of res judicata is inapplicable to the second case because of the changes in the law and intervening decisions creating an altered situation.

Federal questions were raised during a hearing in the first case No. 90-CV-484, on May 30, 1991. The questions raised were sovereign immunity, lack of subject

matter jurisdiction and other reasons set forth on the record. Defendants agreed to remove on basis of "other paper" or other appropriate method. The fraudulent concealment of serious conditions motivated defendants not to act at all. See; Government Nuclear Waste Dump (appendix, pg. 36) located and opened by Plaintiff, only the 1st part of 1993. Another fraudulent concealment was a sabotage act on the Nuclear Missile Base; (1970 Act).

The disposition in the Trial Court, (appendix, pg. 7,) complaint dismissed with prejudice based upon the Doctrine of Res Judicata. The Court of Appeals decision, (appendix, pg. 5) ruled that the Trial Court ruled that Maloney's suit was a replica of the suit he filed in 1990, which the Trial Court had dismissed on the basis of sovereign immunity, lack of subject matter jurisdiction and other grounds. The (defendants) did not give (a notice of dismissal) to Plaintiff as required by Wisconsin Statute. The failure to give notice (Wis. Stat.), caused Plaintiff to lose appeal time by a lengthly period of time. We have reviewed the two complaints and agree with the Trial Court;s conclusion that they are virtually identical. Res Judicata bars such repetitive suits. We also reject Maloney's argument on appeal that

he received no notice of the 1990 lawsuit's dismissal and that res judicata, is therefore not applicable. We know of no such exception to Res Judicata, and Maloney has cited none. Similarly, we reject Maloney's argument that the 1990 lawsuit's contained other defects. Maloney should have raised these matters by appeal from the dismissal.

The Appeals Court filed a remittitur, May 6, 1993 on the Order affirmed. The Wisconsin Supreme Court denied the petition for review on May 4, 1993. The petition for review, was based on the U.S. Supreme Court Case of a previous Wis. case; that being State Farm Mut. Automobile Ins. Co. V. Duel, 65 S. Ct. 573, 324 U.S. 154; (1945). The State Farm case ruled that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation.

Immunity issue was raised in Appeals Court reply brief; from not even qualified immunity by violation of clearly established statutory or constitutional right (there is no sovereign immunity available to defendants); People of Three Mile Island V. Nuclear Regulatory

Comm's, 747 F. 2d at 145, (1984), Sec. III, not even qualified immunity.

Plaintiff's second action (appendix, pg.15) clearly specifies (estoppel and waiver by any State or Federal law, Statute or Constitution and total and inclusive of any and all Court decisions and or opinions.

ARGUMENT.

A. A CONTROLLING QUESTION OF LAW (SILKWOOD DECISION) HAS BEEN MODIFIED, COLLABORATION WITH PERSON INDEMNIFIED UNDER 2210 (h) HAS NOT OCCURRED AND OCCURRENCES WERE BEFORE AUGUST 20, 1988, LEAVING CONCURRENT JURISDICTION.

Plaintiff Maloney's case does not fall under the Amendments Act 42 USC §2210 (s), August 20, 1988, because alleged releases and occurrences from Government nuclear waste dumping (appendix, pg. 36) including the example of the U. S. Army Corp. of Engineers dumping in Lake Superior, (appendix, pg. 10), are before (August 20, 1988). The Amendments modify Silkwood's primary holding that punitive damages are never pre-empted by Federal law, but it is unclear to what extent the rest of its reasoning survives. IN RE TMI LITIGATION CASES CONSOL. II, 940 F. 2d at 870, (3rd Cir. 1991. Section 2210 (s) amendments has not changed the requirements of before August 20, 1988 occurrences. In case; Cook V. Rockwell Intern. Corp., 755 F. Supp. at 1479, (D. Colo. 1991): However, I further hold that punitive damages for nuclear incidents occurring before that date are not barred by Section 2210 (s) or by Sovereign Immunity. 42

USC §2210 (s); this section "shall become effective on the date of the enactment of this Act; (August 20, 1988) and shall be applicable with respect to nuclear incidents occurring on or after such date;" Cook Supra, at 1480. Furthermore; even if the United States is not obligated to make payments for punitive damages, all that is necessary for the applicability of the statute is that the United States be obligated to make payments under an agreement of indemnification covering a nuclear accident. Atimic Energy Act of 1954 §170 (s), as amended 42 USCA §2210 (s), Cook Supra, at 1469.

Plaintiff's case here is before the boundaries of August 20, 1988, Amendments Act. The Amendments Act do not apply here because the alleged Government nuclear waste dumping occurred approximately between 1973-1980, with releases during a continued time before August 20, 1988. The Act where on or after (August 20, 1988) has no application whatsoever. Cook Supra, at 1480.

Prior to the Amendments, Congress provided original jurisdiction only for ENOs; (2210 (n)(1). Given the effect of §2210 (n)(1) on liability for such occurrences, this earlier version of §2210 (n)(2) would certainly stand on stronger Constitutional ground. But the appli-

cation of §2210 (n)(1) would be speculative even in those instances. IN RE TMI Supra, at 871. The foregoing involves strict liability. In Hennessy, however the Court left open the issue of whether State law may impose Strict liability for nuclear incidents. Hennessy V. Commonwealth Edison Co., 764 F. Supp. 495, (N.D. Ill. 1991); as used in, IN RE TMI Supra, at 870. The United States as defendants; and alleged extreme "derelict of duty" have made no (ENO) determination under §2210 (n)(1). Plaintiff's complaint details such reckless regard and outrageous acts and meets Conley V. Gibson, 355 US 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

The Government is authorized to intervene in public liability actions as soon as it believes it will be required to indemnify a party. In conjunction with 2210 (h) it appears that the United States (the Commission or the Secretary), as appropriate, shall collaborate with any person indemnified 2210 (h) before any attempt to remove. Congress could have authorized in these instances as it has under the Federal Officer Removal Statute, with respect to that statute, the Court has indicated that any other scheme would be unconstitutional. See Mesa V. California, 489 US 121, 109 S. Ct. 959, 103

L. Ed. 2d 99 (1989). (interpreting 28 USC §1442 (a)(1). In addition, because the indemnification issues do not directly affect the merits of the Plaintiffs case the necessity for original jurisdiction is decreased. IN RE TMI Supra, at 874. Where, however, only one person is affected by the nuclear incident, as in O'Conner, 748 F. Supp. 672; or where all claims are filed in a single state court, resolution of the public liability action may efficiently be resolved absent removal. IN RE TMI Supra, at 861.

The equitable doctrine of estoppel in pais, or (the application of) fraudulent concealment a doctrine which can "prevent a ... resort to the statute of limitations as a defense ... where the defendant conceals facts or otherwise induces the plaintiff not to bring suit within the period of the applicable (limitations period). IN RE HANFORD NUCLEAR RESERVATION LITIGATION, 780 F. Supp. at 1576, (E.D. Wash. 1991). Plaintiff Maloney contends that the "estoppel in pais" applies distinctively throughout the case and the Writ of Certiorari. Also see that the Government Nuclear Waste Dump was located and opened by Plaintiff with a geiger counter instrument during the 1st part of 1993. (appendix, pg. 36); The

foregoing dump was the application of fraudulent concealment. Plaintiff Maloney's action may efficiently be resolved absent removal; as used in, IN RE TMI Supra, at 861.

Plaintiff also makes reference to a case where (EN O) was not designated. This section conferring original jurisdiction on United States District Courts, without regard for diversity of citizenship or amount of controversy, over any public liability action arising out of extraordinary nuclear occurrence did not apply where Secretary of Energy had not designated incident involved as extraordinary nuclear occurrence. UNC Resources Inc. V. Benally, 518 F. Supp. 1046, (D.C. Ariz. 1981).

B. DEFENDANTS DO NOT EVEN HAVE QUALIFIED IMMUNITY, BECAUSE THEY HAVE VIOLATED A CLEARLY ESTABLISHED STATUTORY OR CONSTITUTIONAL RIGHT.

The Constitutional violations are clearly delineated in Plaintiff's complaint. The allegations are specific and further delineated throughout the complaint. There is no sovereign immunity available to defendants because they have violated clearly established statutory or constitutional rights. People of Three Mile Island V.

Nuclear Regulatory Comm's, 747 F. 2d at 145, (1984), Sec. III, not even qualified immunity. The evidence filed in this case supports the allegations to an extremely high degree. In fact the evidence shows the defendants have admitted a "dereliction of duty".

C. THE DEFENDANTS HAVE LEFT THEMSELVES AS HOSTILE, UNLAWFUL INDIVIDUALS, ADMITTING "DERELICTION OF DUTY" AND MAKING THE FILING OF A CLAIM HAZARDOUS TO PLAINTIFF, WITH RECKLESS REGARD TOWARD HUMAN LIFE AND LACK OF NUCLEAR WASTE DUMPING INVESTIGATION REMAINS.

See (Motion for Summary Judgment, (appendix, pg. 32,). A summary of the acts and behaviors of defendants. The complaint adequately states the hostility. The Congressional Subcommittee statements by Bella Abzug adequately expresses the behavior towards government inquiries. Bella Abzug; I have learned that not only mine, but several government inquiries were thwarted by intentional refusals on the part of the FBI and Kerr-McGee to cooperate with investigating authorities; (appendix, pg. 29).

Plaintiff Maloney has stated in his brief that approximately 100 violations, non-compliance and civil

penalities based upon violations and non-compliance with Federal regulations, nuclear safety and environmental and health standards. The statements made by Congressional Subcommittee (Bella Abzug), clearly indicates that Karen Silkwood was very active with the OIL, CHEMICAL AND ATOMIC WORKERS UNION, (OCAW) on safety issues and safety of the public from nuclear accidents. Plaintiff Maloney demonstrates very clearly his involvement with the (OCAW) UNION, LOCAL 6-662 & 6-717, Hastings, Minn.) Affidavit, (appendix, pg. 28) that the 100 violations stated above are directly or indirectly involved in the reckless regard towards plaintiff's life. The Government Nuclear Waste Dump was just located and opened up the 1st part of 1993 and it is approximately 200 feet from Plaintiffs house. Other dump areas were located and marked out also.(appendix, pg.36).

The Government dumped the Nuclear Waste and has failed to collaborate with any persons indemnified under 2210 (h). The Price Anderson Act authorizes indemnification agreements, 42 USC §2210 (a), (c), (d). It authorizes the United States to "take charge" and "settle" or defend any such action." 42 USC §2210 (h). Also see, U.S. Army dumping in Lake Superior, (appendix, pg. 10)

of Honeywell waste a defense contractor with many of the violations out of the 100, in the foregoing paragraph.

D. RES JUDICATA IS NO DEFENSE WHERE THERE HAS BEEN AN INTERVENING DECISION OR A CHANGE IN THE LAW CREATING AN ALTERED SITUATION.

The Law governing 2210 has been changed from an intervening decision, Oct. 31, 1991, in case, IN RE HANFORD NUCLEAR RESERVATION LITIGATION, 780 F. Supp. 1551, (E.D. Wash. 1991). "Law of the state" within meaning of Price-Anderson Act, meant whole law of state, including any choice of law provisions, rather than simply net portion which relates specifically to substance.

42 USCS §2210 (L); executive order, as amended, Ex. Ord. No. 12665, Jan. 12, 1989, 54 F.R. 1919, was revoked by Ex. Ord. No. 12774, Sept. 27, 1991, 56 F.R. 59835, 42 USCS §2210 (L) creating situation of unfinished business towards Plaintiff' action and after 1st judgment of June 7, 1991.

The Amendments Act modify Silkwood's primary holding that punitive damages are never pre-empted by Federal law, but it is unclear to what extent the rest of its reasoning survives. IN RE TMI LITIGATION CASES CON-

SOL. II, 940 F. 2d at 870, (3rd Cir. 1991).

Plaintiff Maloney has included in the second action (appendix, pg. 15) (estoppel and waiver by any State or Federal Law, Statute or Constitution and total and inclusive of any and all Court decisions and or opinions) which in fact has applied the U. S. Supreme Court case State Farm Mut. Automobile Ins. Co. V. Duel, 65 S. Ct. 573, at 577, 324 U. S. 154, (1945). But if that principle is inapplicable here it is nevertheless the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation. 2 Freeman on Judgments (5th ed. 1925) §713; Blair V. Commissioner, 300 U.S. 5,9, 57 S. Ct. 330, 332, 81 L. Ed. 465; West Coast Life Ins. Co. V. Merced Irr. Dist., 9 Cir., 114 F. 2d 654, 662; In re Pomeroy, 51 Mont. 119, 151 P. 333; Hurd V. Albert, 214 Cal. 15, 26, 3 P. 2d 545, 76 A.L.R. 1348. We cannot find that Wisconsin has a different rule.

Plaintiff Maloney has not amended action. In the State Farm Supra, at 577; The Wisconsin statute, moreover, gives the court power to allow an amendment "at

any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just" provided that "the amended pleading states a cause of action arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based."

E. PLAINTIFF HAD PROPER SERVICE ON DEFENDANTS AND THE DISTRICT OF COLUMBIA AREA IS NOT A STATE, BUT A FEDERAL DISTRICT, AND U.S. MAIL IS PROPER SERVICE BY STATUTE.

Federal Rules of Civil Procedure (Rule (d)(5), pg. 52; Effect of 1983 amendment.) (d)(5) substituted "sending a copy of the summons and of the complaint by registered or certified mail" for "delivering a copy of the summons and of the complaint". Washington, DC is not a State; 801.11, Wis. Stat., Sub. (1) (b) is amended to permit substituted service upon non-residents or residents of other states. Service upon non-residents may be made with the substituted rule of the state wherein service is made. The defendants received the summons and complaint as the receipts show. The following case demonstrates this further; Plaintiff's failure to perfect service by mail under Rule 4 did not preclude ser-

vice under State longarm statute, where defendant received actual notice of suit by method of service authorized by rules and was not unfairly subjected to court's jurisdiction, since literal interpretation of Rule 4 does not automatically require that if attempt to affect service by mail fails, only personal service is permitted. Humana, Inc. V. Avram A. Jacobson, M.D. P.A., 804 F. 2d 1390, (CA 5, Tex 1986).

CONCLUSION.

For the reasons set forth above, plaintiff submits that this court should reinstate this case in the trial court on the basis that the "whole law of the state" is proper; no ENO has been determined, concurrent jurisdiction applies, collaboration with any persons has not occurred under 2210 (h), and "derelict of duty" by defendants is predominant. Res judicata and sovereign immunity* is unavailable to defendants.

1st day of
Aug. 1993.

Dated this 1st day of August, 1993.

Respectfully submitted,

Daniel P. Maloney, Pro Se
Rt. 1, Box 313G
Roberts, Wisc. 54023

APPENDIX.

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COURT OF APPEALS

OF WISCONSIN

P. O. BOX 1688

MADISON, WI 53701-1688

DISTRICT 3

REMITTITUR

DANIEL P. MALONEY,

PLAINTIFF-APPELLANT,

V.

APPEAL NO. 92-2110

T. Ct. NO. 92-CV-70

UNITED STATES* OF AMERICA, ET AL.,

DEFENDANT-RESPONDENT.

THIS CAUSE WAS AN APPEAL TO REVIEW THE ORDER OF THE CIRCUIT COURT OF ST. CROIX COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON FEBRUARY 16, 1993, THAT:

Order affirmed.

PANEL: DLL G M T C

PANEL: HON. DANIEL L LAROCQUE

HON. THOMAS CANE

HON. GORDON MYSE

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR ST CROIX COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:

MAY 06, 1993

/S/MLG

MARILYN L. GRAVES

CLERK, COURT OF APPEALS

OFFICE OF THE CLERK

SUPREME COURT

231 E. STATE CAPITOL

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

TELEPHONE 608-266-1880

May 4, 1993

TO:

HON. ERIC J. LUNDELL
ST. CROIX COUNTY CIR. CT.
911 4th STREET
HUDSON, WI 54016

DANIEL P. MALONEY
ROUTE 1, BOX 313G
ROBERTS, WI 54023

RICHARD D. HUMPHREY
KEVIN C. POTTER
U.S. DEPT. OF JUSTICE
120 N. HENRY, RM, 420
MADISON, WI 53703

YOU ARE HEREBY NOTIFIED THAT THE COURT HAS ENTERED THE FOLLOWING ORDER:

No. 92-2210 Maloney V. United States of America L.C. # 92cv70

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner Daniel P. Maloney, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves

Clerk of Supreme Court

COURT OF APPEALS

DECISION

DATED AND RELEASED

FEBRUARY 16, 1993

A Party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to rule 809.62(1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of the Official Reports.

NO. 92-2110

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT III

DANIEL P. MALONEY,

Plaintiff-Appellant,

V.

UNITED STATES OF AMERICA, ET AL.,

Defendant-Respondent.

APPEAL from an order of the circuit court for St. Croix county:

ERIC J. LUNDELL, Judge. Affirmed.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Daniel Maloney appeals an order that dismissed his action against the United States of America on the basis of res judicata. The trial court ruled that Maloney's suit was a replica of the suit he filed in 1990, which the trial court had dismissed on the basis of sovereign immunity, lack of subject matter jurisdiction and other grounds. We have reviewed the two complaints and agree with the trial court's conclusion that they are virtually identical. Res judicata bars such repetitive suits. Juneau Square Corp. V. First Wis. Nat. Bank, 122 Wis. 2d 673, 682, 364 N.W. 2d 164, 169 (Ct. App. 1985). We also reject Maloney's argument on appeal that he received no notice of the 1990 lawsuit's dismissal and that res judicata is therefore not applicable. we know of no such exception to res judicata, and Maloney has cited none. Similarly, we reject Maloney's argument that the 1990 lawsuit's contained other defects. Maloney should have raised these matters by appeal from the first dismissal.

By the Court.--Order affirmed.

This opinion will not be published. See Rule 809.23 (1)(b)5, Stats.

STATE OF WISCONSIN CIRCUIT COURT ST. CROIX CO.

DANIEL P. MALONEY,

PLAINTIFF,

V. Case No. 92-CV-70

UNITED STATES OF AMERICA,

DEFEMDANT.

ORDER OF DISMISSAL

Plaintiff filed a complaint in the above-captioned cause of action on February 10, 1992. Said complaint is a replica of the complaint he filed on October 29, 1990, in the case of Daniel P. Maloney V. United States of America, et al., St. Croix County Case No. 90-CV-484. That case was dismissed by the court by order entered on June 7, 1991, based upon sovereign immunity, lack of subject matter jurisdiction, and other reasons set forth on the record during a hearing on May 30, 1991. The complaint in the present case is nearly identical to the plaintiff's complaint in the earlier lawsuit. Since the issues in the present lawsuit were already decided in the earlier lawsuit, the present lawsuit is barred by the Doctrine of Res Judicata. Accord-

ingly,

IT IS HEREBY ORDERED that the plaintiff's complaint is DISMISSED with prejudice, based upon the Doctrine of Res Judicata.

Entered this 21st day of May, 1992.

Eric J. Lundell

HONORABLE ERIC J. LUNDELL

Circuit Judge for

St. Croix County

State of Wisconsin

IN THE STATE OF WISCONSIN CIRCUIT COURT

FOR THE COUNTY OF ST. CROIX

DANIEL P. MALONEY,

PLAINTIFF,

V.

Case No. 90-CV-484

UNITED STATES OF AMERICA, et al.,

DEFENDANTS.

ORDER OF DISMISSAL

The defendants' Motion to Dismiss having come on to be heard on the 30th day of May, 1991, the plaintiff Daniel P. Maloney appearing in person, and the defendants appearing by Grant C. Johnson, United States Attorney for the Western District of Wisconsin, by Richard D. Humphrey, Chief, Civil Division, United States Attorney's Office, and the court having set forth its reasons on the record for dismissal of this cause of action, including but not limited to sovereign immunity and lack of subject matter jurisdiction,

IT IS HEREBY ORDERED that this action is dismissed. Entered this 7th day of June, 1991.

Eric J. Lundell

St. Paul District Army Corps

of Engineers

ATTN: Mr. Robert Dempsey :::::IN NIKE BASE PRESENTLY:

Engineer Manager

1421 U.S.P.O., Custom House

St. Paul, Mn. 55101-1479

Dear Mr. Dempsey:

This refers to your January 2, 1991 telephone conversation with Mr. James Lynch of my staff, regarding the Corp's efforts to recover Honeywell, Inc. waste drums from Lake Superior. Since it is alleged that the drums may contain radioactive material and since Honeywell was and is an NRC licensee, we are interested in the results of the search and recovery operations.

Please keep this office informed of any developments relating to the recovery efforts. We would also appreciate a copy of your report, which we understand should be available in Febr'ary, and a copy of the Army's 1977 report on this same subject. If health physics support is needed during the process, we will make every effort to assist you. Your cooperation in this matter is greatly appreciated. Followup information or questions regarding this issue should be addressed to Mr. Lynch or Mr. J.

Caniano at (708) 790-5500.

Sincerely,

John A. Grobe, Chief
Nuclear Materials Safety
Branch

cc: DCD/DCB (RIDS)
Materials License File
No. SUB-971)

bcc: D. Funk

RIII	RIII	RIII
Lynch/jl	Caniano	Grobe
1-8-91	1-8-91	1-9

BEST AVAILABLE COPY

MEDIA ADVISORY

CORPS AWARDS CONTRACT FOR LAKE SUPERIOR BARREL SEARCH

WHO: St. Paul District, U.S. Army Corps of Engineers, St. Paul, Minnesota

WHAT: Has awarded a contract to Hazard Control, Inc. of Minneapolis, Minn. in the amount of $16,550.00 to conduct a search of the Lake Superior bottom near Duluth, Minn. for barrels dumped into Lake Superior by the U.S. Army between 1959 and 1962. The 1,437 barrels contain metal scraps produced during the research and manufacture of classified munitions.

The search operation has three phases. First, the contractor will conduct an electronic search of the 20-square mile target area using sonar and electro-magnetic detection systems. The second phase of the search involves a search of possible barrel locations based on historical records and data from the electronic search. The second phase will use a two-person submarine provided by the contractor to attempt to locate and photograph as many barrels as possible. The contract allows for approximately five days of search operations. If time permits within the contract, a third phase might include closer inspection of located barrels and an at-

temot to recover one or two barrels. Any barrel recovered will he sealed in an over-sized container and sent to an independent laboratory for analysis of the contents.

WHERE: The search operation will be conducted in an approximately 20-square mile area off the North Shore of Lake Superior between the Lester River and the Knife River. Records indicate that the barrels were dumped in water greater than 100-300 feet in depth.

WHEN: The contract was awarded on September 28, 1990. The search is tentatively scheduled to begin on Thursday October 11, 1990, weather permitting.

WHY: The barrel search project is being condcuted under the Defense Environmental Restoration Program, a Department of Defense subsection of the EPA Superfund Program. One aspect of the restoration program includes finding and inspecting sites formerly owned or used by DOD. Once located, the sites are inspected for hazardous debris, munitions or toxic materials related to the operation of the site by DOD. Since the barrels contained material generated by a DOD contractor working on a classified defense munitions contract and the disposal was directed by an Army organization, the barrel disposal site

qualifies for review and analysis under the Defense Environmental Restoration Program for Formely Used Defense Sites. The current contract will provide data to be used by the Corps in determining the need for any future remedial action.

MEDIA ARRANGEMENTS: Media arrangements (news conferences, equipment demonstration,, Duluth media center telephone number, etc.) will be announced on October 9th.

CONTACT: Ken Gardner or Joan Guilforly at 612-220-0201. US Army Corps of Engineers, 1421 US Post Office, St. Paul MN 55101-9808. The project's media center will open at the Corps' Duluth Area Office on Thursday, October 11th.

STATE OF WISCONSIN CIRCUIT COURT ST. CROIX COUNTY

DANIEL P. MALONEY,

PLAINTIFF,

VS. COMPLAINT

UNITED STATES OF AMERICA, et al., NO. 92-CV-70

DEFENDANTS.

The Plaintiff, Daniel P. Maloney brings this complaint against the above defendants and shows the Court as follows:

FIRST CAUSE OF ACTION

1. United States of America and the Atomic Energy Commission, (DOE), with a Mailing address of Washington, DC.

2. United States of America and the Nuclear Regulatory Commission, with a mailing address of Washington, D.C..

3. United States of America and the Central Intelligence Agency (CIA), with a mailing address of Washington, D.C..

4. United States of America and the Pentagon, with a mailing address of Washington, D.C..

5. The above defendants, by waiver and estoppel are void of any legitimate defense or issue within this com-

plaint. Plaintiff's right to any claim, antecedent claim, total and inclusive, whether invoked by estoppel or waiver, remains in full for prosecution by plaintiff, (estoppel and waiver by any State or Federal Law, Statute or Constitution and total and inclusive of any and all Court decisions and or opinions).

6. Atomic Energy claims under 42 USCS §2210 (n), maintain a waiver of issues or defenses, jurisdiction and venue. The waiver of any such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. Accordingly, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. All, meaning total and inclusive, issues or defenses are negated by waiver and estoppel, whether by negligence, wanton disregard, or any other form on neglect.

7. Nike Battery 20, was a SAC US Defense, Missile Base, located near Roberts, Wisc.; (retaining Federal Funding 10-27-90).

8. Unstated Nuclear facility, unstated address, to state further would be a violation of Federal Law; (2nd facility).

9. Plaintiff contends that the Top Secret Nuclear

Espionage issued from USDA through photos to plaintiff was a violation of the Espionage Act and Plaintiff was obligated to recapture and report the Espionage under 18 USCS §1505 and §1503.

10. Plaintiff contends that the unstated Nuclear facility was in such a condition as to allow plaintiff to enter the facility by FCC communications, that being the control room, where it was stated it is impossible to enter the control room from the inside of the facility or from the outside by FCC communications; causation Federal negligence, reckless regard.

11. As a proximate result of these contacts with "radiation hazards" and the negligence plaintiff Daniel P. Maloney, suffered personal injuries, distress, anxiety, property damage and life, liberty and property, Art. 14, Sec. 1, U.S. Constitution; equal protection of the laws violations distress injuries.

12. The above described injuries were solely and proximately caused by unreasonably dangerous "radiation hazards" under theories of strict liability.

13. Plaintiff alleges violations of Nuclear Regulatory Commission being 42 USCS §2021 (b)(4), facilities that were somehow in violation of the Atomic Energy Com-

Mission Rules and are licensed to possess special nuclear material in quantity to form a critical mass; Government negligence causation.

14. Plaintiff alleges violations of Espionage Act (18 USCA §794; (b,c), 18 USCA §793, §794; and the Espionage Act of 1917.

15. Plaintiff contends that the negligence constitutes the exercise of a unreasonable care in handling and maintaining Plutonium, and the existence of reckless and wanton conduct in light of the physical characteristics of that material and the risks associated with it; Government negligence.

16. Plaintiff contends that the Atomic Energy Act and the Price-Anderson Act that the Government can provide up to $500,000,000.00 of liability for a cause of action involving "nuclear hazards" and the compensatory damages are an implicit part of the Federal regulatory scheme and furthermore the damages will deter the defendant and others like it, from committing similar acts in the future.

17. Plaintiff exercises the State law rights that being, that making a payment of $500,000,000.00 through the State Court is permissible and available for the

damages and injuries suffered by plaintiff.

18. Plaintiff advises that punitive damages need not be proved by "direct evidence of fraud, malice or gross negligence, but could be inferred and that the primary concern was to assure compensation for persons who suffered loss or injury.

19. Plaintiff contends that any amount less than $500,000,000.00 would be inadequate for the injury suffered in this case where plaintiff has been deprived of the services, society, companionship and consortium; and furthermore the distress, anxiety, psychological stress from an automobile rigged up in an unreasonably dangerous condition to kill plaintiff and such as the telephone call stating that they were going to kill plaintiff, known as (Pentagon People).

20. Plaintiff contends that the Government provides $500,000,000.00 for any one nuclear situation "nuclear hazards" related and the proceeds will apply where the injuries were proximately caused by the negligence of the United States of America.

21. Plaintiff contends that Congress encourages National Safety Regulation under the Price-Anderson Act and Plaintiff may vindicate any particular harm

visited on him from whatever source related to "nuclear hazards".

22. Plaintiff demands that $500,000,000.00 for the nuclear incidents is a fair and just amount for psychological distress, emotional distress, property damage and anxiety, under the Atomic Energy Act and the Price-Anderson Act.

23. Plaintiff bases the amount on extraordinary occurrences of "nuclear hazards" and the negligence is wanton disregard of Plaintiff's rights and that malice and evil intent were inferred; 28 USCS §1257.

24. Plaintiff contends that he has a right to $500,000,000.00 as set by Congress for punishment to the offenders, for the general benifit of society and as a restraint upon the transgressors and a warning and example to deter like offenses in the future. The compensation is calculated by reference to the victims injury.

SECOND CAUSE OF ACTION

25. Plaintiff realleges Paragraphs 1 through 24 of the First cause of action against the defendants with like force and effect as if realleged in full.

26. Plaintiff alleges that he suffered further psychological and physical damage from contaminants left

and carelessly disposed of and said contaminants caused a physical sickness and severe anxiety to plaintiff.

27. Plaintiff further alleges some contaminants related to and used in a nuclear facility were dumped on his property and surrounding property and the specific contaminants caused a physical sickness to plaintiff and anxiety reactions from such.

28. The above described injuries were proximately caused by negligence and such negligence is wanton disregard of plaintiff's rights and that malice and evil intent were inferred from such; 28 USCS §1257.

29. Plaintiff contends that Congress encourages National Safety Regulation under the Price-Anderson Act and plaintiff may vindicate any particular anxiety or harm on him from whatever source related to "nuclear hazards". Furthermore plaintiff has a right to $500,000,000.00 damages set by Congress for punishment to offenders and any particular harm from such.

30. Plaintiff prays that the Court allow the full extent of what Congress encourages and that is the full amount of $500,000,000.00 for the damages to plaintiff.

PLAINTIFF DEMANDS A 12 PERSON JURY TRIAL

DATED: 2-10-92 Daniel P. Maloney

STATE OF WISCONSIN CIRCUIT COURT ST. CROIX CO.

DANIEL P. MALONEY,

PLAINTIFF,

VS.

UNITED STATES OF AMERICA,

DEFENDANTS,

COMPLAINT

No. 90-CV-484

file date: Oct. 29, 90

The plaintiff by Daniel P. Maloney, Pro Se, complain of the defendants as follows;

FIRST CAUSE OF ACTION

1. United States of America and the Atomic Energy Commission, with a mailing address of Washington, D.C.

2. United States of America and the Nuclear Regulatory Commission, with a mailing address of Washington, D.C..

3. United States of America and the Central Intelligence Agency (CIA), with a mailing address of Washington, D.C..

4. United States of America and the Pentagon, with a mailing address of Washington, D.C.

5. Nike Battery 20, was a SAC US Defense, Missile Base located near Roberts, Wisc.; (retaining Federal Funding 10-27-90).

6. Unstated Nuclear facility, unstated address, to state further would be a violation of Federal Law; (2nd facility).

7. Plaintiff contends that the Top Secret Nuclear Espionage issued from USDA through photos to plaintiff was a violation of the Espionage Act and plaintiff was obligated to recapture and report the Espionage under 18 USCS §1505, and §1503.

8. Plaintiff contends that the unstated Nuclear facility was in such a condition as to allow plaintiff to enter the facility by FCC communications, that being the control room, where it was stated it is impossible to enter the control room from the inside of the facility or from the outside by FCC communications; causation Federal negligence, reckless regard.

9. As a proximate result of these contacts with "radiation hazards" and the negligence plaintiff Daniel D. Maloney, suffered personal injuries, distress, anxiety, property damage and life, liberty and property Art. 14, Sec. 1, US Constitution; equal protection of the laws violations distress injuries.

10. The above described injuries were solely and proximately caused by unreasonably dangerous "radiation

hazards" under theories of strict liability.

11. Plaintiff alleges violations of Nuclear Regulatory Commission being 42 USCS §2021 (b) (4), facilities that were somehow in violation of the Atomic Energy Commission Rules and are licensed to possess special nuclear material inquantity to form a critical mass; Government negligence causation.

12. Plaintiff alleges violations of Espionage Act (18 USCA §794; (b,C), 18 USCA §793, 794; and the Espionage Act of 1917.

13. Plaintiff contends that the negligence constitutes the exercise of a unreasonable care in handling and maintaining Plutonium, and the existence of reckless and wanton conduct in light of the physical characteristics of that material and the risks associated with it, Government negligence.

14. Plaintiff contends that the Atomic Energy Act and the Price-Anderson Act that the Government can provide up to $500,000,000.00 of liability for a cause of action involving "nuclear hazards" and the compensatory damages are an implicit part of the federal regulatory scheme and furthermore the damages will deter the defendant and others like it, from committing similar acts in the future.

15. Plaintiff exercises the State law rights that being that making a payment of $500,000,000.00 through the State Court is permissible and available for the damages and injuries suffered by plaintiff.

16. Plaintiff advises that punitive damages need not be proved by "direct evidence of fraud, malice or gross negligence, but could be inferred and that the primary concern was to assure compensation for persons who suffered loss or injury.

17. Plaintiff contends that any amount less that $500,000,000.00 would be inadequate for the injury suffered in this case where plaintiff has been deprived of the services, society, companionship and consortium; and furthermore the distress, anxiety, psychological stress from an automobile rigged up in an unreasonably dangerous condition to kill plaintiff and such as the telephone call stating that they were going to kill plaintiff, known as (Pentagon People).

18. Plaintiff contends that the Government provides $500,000,000.00 for any one nuclear situation "nuclear hazards" related and the proceeds will apply where the injuries were proximately caused by the negligence of the United States of America.

19. Plaintiff contends that Congress encourages National Safety Regulation under the Price-Anderson Act and plaintiff may vindicate any perticular harm visited on him from whatever source related to "nuclear hazards".

20. Plaintiff demands that $500,000,000.00 for the nuclear incidents is a fair and just amount for psychological distress, emotional distress, property damage and anxiety, under the Atomic Energy Act and the Price-Anderson Act.

21. Plaintiff bases the amount on extraordinary occurrances of "nuclear hazards" and the negligence is wanton disregard of Plaintiffs rights and that malice and evil intent were inferred; 28 USCS §1257.

22. Plaintiff contends that he has a right to $500,000,000.00 as set by Congress for punishment to the offenders, for the general benfit of society and as a restraint upon the transgressors and a warning and example to deter like offenses in the future. The compensation is calculated by reference to the victims injury.

SECOND CAUSE OF ACTION

23. Plaintiff realleges Paragraphs 1 through 21 of the First cause of action against the defendants with like force and effect as if realleged in full.

24. Plaintiff alleges that he suffered further psychological and physical damage from contaminants left and carelessly disposed of and said contaminants caused a physical sickness and severe anxiety to plaintiff.

25. Plaintiff further alleges some contaminants related to and used in a nuclear facility were dumped on his property and surrounding property and the specific contaminants caused a physical sickness to plaintiff and anxiety reactions from such.

26. The above discribed injuries were proximately caused by negligence and such negligence is wanton disregard of plaintiffs rights and that malice and evil intent were inferred from such; 28 USCS §1257.

27. Plaintiff contends that Congress encouraces National Safety Regulation under the Price-Anderson Act and plaintiff may vindicate any particular anxiety or harm on him from whatever source related to "nuclear hazards". Furthermore plaintiff has a right to $500,000,000.00 damages set by Congress for punishment to offenders and any particular harm from such.

PLAINTIFF DEMANDS A 12 PERSON JURY TRIAL.

Dated: 10-27-90 Daniel P. Maloney

AFFIDAVIT

OF

DANIEL P. MALONEY

STATEMENT ON ASSOCIATION AND RELATIONSHIP

WITH THE OCAW UNION, LOCALS 6-662 & 6-717

HASTINGS, MINNESOTA.

STATE OF WISCONSIN)

COUNTY OF ST. CROIX)

DANIEL P. MALONEY BEING DULY SWORN ON OATH DEPOSES AND SAYS THAT:

DANIEL P. MALONEY HAD AN ASSOCIATION AND RELATIONSHIP OF USING THE AGREEMENT WITH THE OCAW UNION OF THE FOLLOWING FORMULATION:

CONCURRENCE OF THE COLLECTIVE BARGAINING AGENT:

Is the occupation(s) in which employment and training to be offered subject to a bargaining agreement? Yes__ No__. If yes, has there been concurrence by the appropriate bargaining representatives as to the on-the-job training program and the appropriate bargaining representative;

Collective Bargaining Agent _____ Union affiliation _____

Representative, Title

Signature _____ Date _____

 Daniel P. Maloney

AN URGENT NOT FROM: BELLA S. ABZUG

Dear Friend,

Three years ago my Congressional Subcommittee on Individual Rights did an initial probe into the facts surrounding the death of a 28-year-old worker in a Kerr-McGee plutonium production plant, Karen Silkwood.

It was my hope that a Congressional investigation would uncover how Karen Silkwood and her home were contaminated with deadly plutonium--- and what happened the night of her mysterious death.

I have learned that not only mine, but several government inquiries were thwarted by intentional refusals on the part of the FBI and Kerr-McGee to cooperate with investigating authorities. And, the most recent inquiries are being obstructed with the all-too-familiar claim of "national security". I am increasingly concerned and want to share with you some of the available information about Karen's death and what she was trying to bring to our attention.

By detailing some of Karen's last moments alive, I hope to convey to you how crucial this case is. Much of what we know today is the result of the back-breaking and crusading efforts of the National Emergency Civil

Liberties Foundation, the Quixote Center, Supporters of Silkwood (S.O.S.), and the N.O.W. Labor Committee---organizations which have coordinated investigations, litigation, education, and fundraising on Karen's behalf since 1975. These organizations and others are now cooperatively supporting this case through the Karen Silkwood Fund---a tax-exempt program of the Youth Project.

During the last months of her life Karen Silkwood was very active within her union, the Oil, Chemical and Atomic Workers. She was not only involved with safety issues on her job---she was also concerned with the larger question: the safety of the public from nuclear accidents. For a month before her death Karen was collecting documented evidence about alarming plant hazards for upcoming contract negotiations and for national press.

Karen;s specific job was that of a laboratory technician checking various fuel mixtures. Fearful of its toxicity, Karen was careful when handling plutonium on the job. But, a week before her death, an instrument search revealed that karen was heavily contaminated. This was not from an accidental spill on her job which could have conceivably occurred rather, Karen was con-

taminated from where she least expected it....her home!! And the Government Accounting Office (GAO) Report revealed that the highest levels of contamination were on the food in her refrigerator!!!

AUGUST , 1978

00019

STATE OF WISCONSIN CIRCUIT COURT ST. CROIX COUNTY

DANIEL P. MALONEY,

PLAINTIFF

V.

UNITED STATES OF AMERICA, et al.,

DEFENDANTS.

CASE NO. 92-CV-70

MOTION FOR SUMMARY JUDGMENT

DANIEL P. MALONEY, PLAINTIFF IN THE ABOVE ACTION, HEREBY MOVES THE COURT FOR SUMMARY JUDGMENT IN HIS FAVOR AGAINST THE UNITED STATES OF AMERICA, et. al., DEFENDANTS HEREIN.

THIS MOTION IS BASED ON ATTACHED AFFIDAVITS, FILINGS AND COMPLAINT, WHEREBY THE DEFENDANTS, KNOWN AS THE UNITED STATES OF AMERICA, et. al., HAVE DEMONSTRATED A HOSTILE AND PREJUDICIAL SERIES OF BEHAVIORS, TO AVOID TREATMENT OF ANY CLAIM FROM PLAINTIFF. THE NATURE OF THE HOSTILE AND PREJUDICIAL BEHAVIORS, HAVE INCLUDED OBSTRUCTING CONGRESSIONAL INVESTIGATIONS, RIGGING UP PLAINTIFF"S AUTOMOBILE TO KILL HIM, THEFT OF EVIDENCE ON DEVICES TO EXPLODE PLAINTIFF"S AUTOMOBILE, A TELEPHONE CALL (2) THREATING TO KILL PLAINTIFF AND MANY OTHER NUMEROUS THREATS ON HIS LIFE. DEFENDANTS HAVE MAINTAINED INDIFFERENCE AND A HOSTILE ATTITUDE TOWARDS

STATEMENTS MADE IN 1981 AND 1982, CONGRESSIONAL HEARINGS ON PHYSICAL SECURITY ON U. S. MILITARY BASES AND ESPIONAGE/PHYSICAL SECURITY RELATED FACTORS. THE FOREGOING HAS LEFT THE INDEMNITY AGREEMENT FOR DAMAGES IN A ADVERSE PROCEDURAL POSTURE ON STATUTE 42 USCS §2210.

THE ABOVE HOSTILE AND PREJUDICIAL ACTIONS IN CONJUNCTION WITH A FAILURE TO TAKE REASONABLE STEPS TO MITIGATE DAMAGES ON PLAINTIFF WHO IS INDEMINIFIED UNDER 42 USCS §2210, MAKE THIS MOTION FOR SUMMARY JUDGMENT PROPER. WAIVER OF ANY ISSUES AND DEFENSES ARE ALSO PROPER.

THIS MOTION, FURTHERMORE IS MADE ON THE GROUNDS THAT THE DEFENDANTS, AS A MATTER OF LAW (42 USCS § 2210) ARE OBLIGATED TO INDEMNIFY THE PLAINTIFF FOR ALL SUMS WHICH THE PLAINTIFF MAY DEMAND AND RECOVER AGAINST DEFENDANTS. PLAINTIFF PRAYS THAT THE COURT GRANT THE COMPLETE AMOUNT OF DAMAGES FROM THE DEFENDANTS BASED ON THE FOREGOING.

RESPECTFULLY SUBMITTED;

DATED: 5-4-92 Daniel P. Maloney

U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
WESTERN DISTRICT OF WISCONSIN

Room 420, United States Courthouse, 120 N. Henry Street, Madison, Wi 53703

July 6, 1992

Daniel P. Maloney
Route 1
Box 313G
Roberts, WI 54023

Re: Daniel P. Maloney V. United States of America, et al,. Case No. 92-CV-70

Dear Mr. Maloney:

Enclosed please find an executed copy of the Order of Dismissal in the above-captioned case. By copy of this letter, all relevant government agencies are being provided with a copy of this document.

Very truly yours,

KEVIN C. POTTER
United States Attorney,

By: Richard D. Humphrey

RICHARD D. HUMPHREY

Chief, Civil Division

RDH/J1z

cc: Judy Regan

Environmental law

Air Force

AFLSA/JACE

Building 5683

Bolling Air Force Base

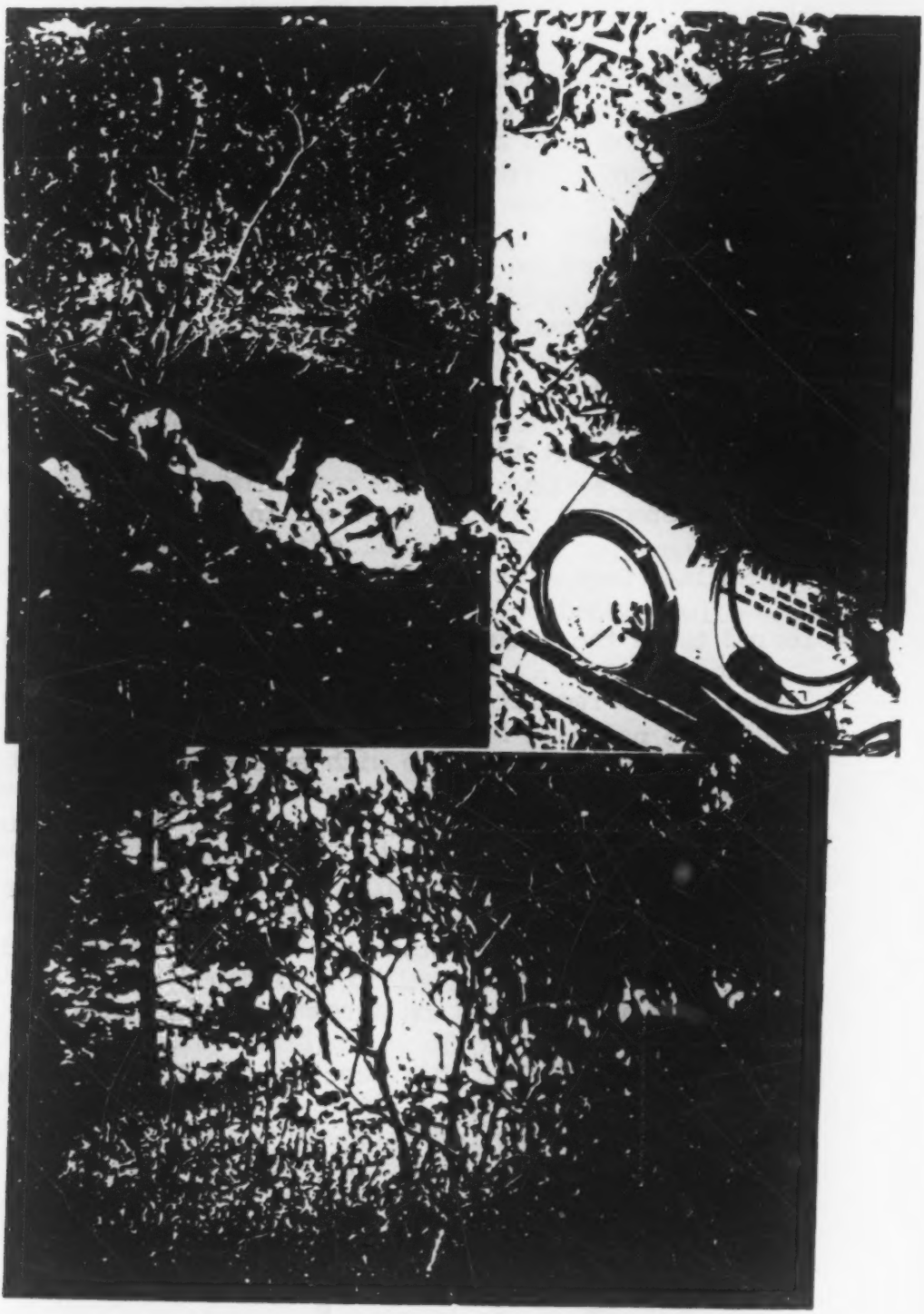
Washington DC 20332-6128

Department of Energy

1000 Independence Ave. S.W.

Washington, DC 20461

GOVERNMENT NUCLEAR WASTE DUMP



§2210 (a) Requirement of financial protection for licenses

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012 (i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the license execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

§2210 (c) Indemnification of licenses[1] by Nuclear Regulatory Commission.

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 2002, for which it requires financial protection of less than $560,000,000.00, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial pretection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000.00 excluding costs of investigating and settling claims and defending suits for damage: Provided, however, That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000.00. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August

1 , 2002.

(d) Indemnification of contractors by Department of Energy.

(1)(A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until August 1, 2002, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involves the risk of public of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section.

(B)(i)(I) Beginning 60 days after August, 1988, agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85-804 entered into between August 1, 1987, and August 20, 1988.

(II) The Secretary may incorporate in agreements of in-

demnification under paragraph (A) the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity authorized in subsection (n)(1) of this section to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 10222 of this title shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b) of this section.

(2) In agreements of indemnification entered into under Paragraph (1), the Secretary may require the contractor to provide and maintain financial protection of such type and in such amounts as the Secretary ahall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, to the full extent of the aggregate public

liability of the persons indemnified for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3)(A) Notwithstanding paragraph (2), if the maximum amount of financial protection required of licensees under subsection (b) of this section is increased by the Commission, the amount of indemnity, together with any financial protection required of the contractor, shall at all times remain equal to or greater than the maximum amount of financial protection required of licensees under subsection (b) of this section.

(B) The amount of indemnity provided contractors under this subsection shall not, at any time, be reduced in the event that the maximum amount of financial protection required of licensees.

(C) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any peron, shall be deemed to be amended, on August 20, 1988, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection on such date.

(4) Financial protection under paragraph (2) and indemnification under paragraph (1) shall be the exclusive means of financial protection and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 5842 of this title.

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed $100,000,000.00 .

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device whall be liable to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principle, and no immunity or defense founded in the Federal or State, or municipal

character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

(h) Conditions of agreement of Indemnification.

The agreement of indemnification may contain such terms as the Commission or the Secretary, as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear to settle claims as Counsel on behalf of the person indemnified, take charge of approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(n) Waiver of defenses and judicial procedures.

(n) Waiver of defenses and judicial procedures.

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which-

(A) arises out of or results from or occurrs in the course of the construction, possession, or operation of a production or utilization facility.

(B) arises out of or results from or occurs in the course of transporation of source material, byproduct material, or special, or special nuclear material to or from a production or utilization facility.

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a divice utilizing special material or byproduct material.

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 2073, 2093, or 2111, of this title, for which the Commission has imposed as a condition of the license a requirement that the license have and maintain financial protection under

subsection (a) of this section.

(E) arises out of, results from, or occurs in the course of, transporation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section, or

(F) arises out of, results from, or occurs in the course of juclear waste activities.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have

known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as

proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of Title 28, or within the 30-day period beginning on August 20, 1988, whichever occurs later.

(s) Limitation on punitive damages.

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.